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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

**No. 115**

STEPHEN FRANKLIN REYNOLDS,

*Petitioner,*

vs.

H. G. COCHRAN, JR., Director of Division of Corrections, State of Florida.

*Respondent.*

## BRIEF OF THE RESPONDENT

H. G. COCHRAN, JR., Director,
Division of Corrections, State
of Florida
Respondent

RICHARD W. ERVIN
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## BRIEF OF THE RESPONDENT

## STATEMENT OF THE CASE

Apart from the arguments which petitioner advances in this portion of his brief to say naught of the case authorities cited and legal conclusions drawn therefrom, in support of his allegations, respondent accepts only so much of petitioner's statement of the case as reflects a true and correct resume of the various steps taken below.

## ARGUMENT

In partial response to petitioner's argument under point one, it would be folly to suggest that respondent takes any issue with the question of whether petitioner had satisfactorily raised a Federal question in his proceedings before the Florida Supreme Court for indeed this response is at least a tacit admission that such a requirement has been met.

It would be likewise foolish for respondent to contend that petitioner was not entitled to seek relief via the media of habeas corpus before the Florida Supreme Court.

Similarly, it is not contended that petitioner's petition for Writ of Habeas Corpus to the Supreme Court of Florida was barred by a former adjudication thereof in any other court qualified to pass thereon.

Having made the former concessions, it remains only to be determined whether in fact the Florida Supreme Court effected a denial to petitioner of due process when it denied his petition for writ of habeas corpus on the basis of the contents set out therein. In the last analysis, if the contentions set out in petitioner's pleadings before the Florida Supreme Court did not even make out a prima facie case such as would justify either a response, a return or a hearing on those matters, the Florida Supreme Court was correct in ruling as it did.

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So much of petitioner's argumen[t] under point two, as directs itself to the alarming theor[y] [t]hat he could not be

proceeded against as a multiple offender simply because his second felony sentence had been completely served before any such proceedings were taken against him, must be summarily rejected for a lack of any merit whatever.

The general statute of limitations as to the prosecution of non-capital criminal offenses, Section 932.05, Florida Statutes, has no application to habitual criminal prosecutions under Section 775.09, Florida Statutes, (*Milan v. State*, Fla., 102 So. 2d 595, 596) and there is no statute which places any limit of any kind upon prosecutions under Section 775.09, supra. The matter is governed exclusively by the following provisions of Section 775.11, Florida Statutes, (which have been in effect literally unchanged ever since they were first enacted in 1927 as a portion of Section 3 of Chapter 12022):

> "775.11 Procedure in prosecutions for second and subsequent offenses. -- If *AT ANY TIME after sentence or conviction* it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in §775.09 or §775.10 the prosecuting attorney of the county in which such conviction was had, shall file an information accusing said person of such previous convictions, whereupon the court in which such conviction was had shall cause said person, *WHETHER CONFINED IN PRISON OR OTHERWISE*, to be brought before it * * *." (Emphasis Supplied)

It seems almost unnecessary to declare that these statutory provisions mean precisely what they say; that is, that *AT ANY TIME* after sentence or conviction, a de-

fendant can be informed against and tried as a second offender when it appears that he has previously been convicted of two felonies as set forth in Section 775.09, supra. Said another way, said statutory provisions permit the prosecution of a defendant as a second felony offender even though he has completely served the sentence originally imposed against him as a result of his second felony conviction.

Such a proposition is firmly entrenched in the decisions of all of the appellate courts of this Country which have construed similar statutory provisions. [*People ex rel. Fernandez v. Kaiser* (N.Y.), 246 N.Y.S. 309, affirmed 177 N.E. 149, certiorari denied 284 U.S. 631; *State v. Sudekatus* (Ohio), 51 N.E. 2d; *In re Sims* (Ohio), 104 N.E. 2d 193; *State v. George* (La.), 48 So. 2d 265; and *Little v. Gladden* (Ore.), 273 P. 2d 443].

There is a case which held that a habitual criminal sentence could not be imposed after the sentence originally imposed had been fully served, that being the case of *Ex parte Broom* (Ore.), 255 P. 2d 1081. However, that very doctrine in the Broom case was repudiated by the same Oregon court in the later case of *Little v. Gladden,* supra, which latter case is squarely in line with the decisions of the other appellate courts throughout the Nation referred to above.

The undeniable result is simply that Florida has a statute of limitations applicable to the prosecution of non-capital offenses but places no limit upon the time within which an information can be filed against a defendant for the purpose of subjecting him to an enhanced

penalty as a second offender. This classification indeed does not deny the second offender the equal protection of the law. There is a sound basis to the classification. The Legislature could reasonably have determined that it is far more important that a second felony offender be informed against as such and thereby receive the enhanced punishment provided by Section 775.09, supra, than for an ordinary offender to be informed against and punished for his crime proper. The Legislature surely could have considered that to inform against and impose an enhanced penalty against a second offender would have a far greater deterrent effect upon like-minded evil doers than to inform against and punish other offenders. Such considerations could reasonably have formed a valid basis for placing no limit upon the time within which the filing of the second offender information could be made while at the same time specifically limiting the time for filing ordinary non-capital criminal informations.

If, in any case, it might conceivably be considered that a second offender information was filed against the defendant so long after he had completely served the sentence originally imposed for the second offense as to shock the conscience of this Court and mankind in general, and thereby amount to a denial of due process of law, it is respectfully submitted that no such situation is presented here. The second offender information in the instant proceedings shows that petitioner's second conviction was for grand larceny and that a two-year sentence was imposed therefor on May 10, 1956. With the aid of gain time earned by him, he completed the service of said sentence on December 1, 1957. The reverse of the

second offender information shows that it was filed less than three months thereafter, viz. on February 15, 1958. Such a short delay cannot be considered to have subjected the petitioner to a fundamental unfairness amounting to a denial of due process of law.

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Perhaps a hypothetical would best illustrate the logical reasoning which gave rise to the conclusion advanced by respondent under this division:

> "A" had been lawfully charged with, convicted of and sentenced for a felony in the State of Florida in 1930. After "A" had completely served said sentence, a period of seven years transpires after which he is again lawfully charged with, convicted of and sentenced for a felony violation of the laws of the State of Florida. However, the court, exercising its discretion in selecting the alternative punishment provided, chose instead to impose against "A" only the fine provision of the penalty. This, "A" promptly pays.

He goes on about his merry way and the State of Florida (if we adopt petitioner's rationale) is thereafter precluded from proceeding against him as a second felony violator simply because it did not initiate the proceedings before he paid the fine.

To the possible assertion that this may constitute a ridiculous illustration, your respondent may only conclude that if the logical force with which petitioner presents his

reasoning does in fact exist, it should exist within any and all limits to which the facts of a given situation could be stretched.

It is respectfully submitted that, faced with the above hypothetical which could well and does often occur in a number of instances, the legislation against habitual offenders would be effectively emasculated by the simple expedient of a given violator complying with the punishment order of the court and thereby defeating the very purposes for which the legislation was enacted.

Another illustration of the ridiculous possibilities such an interpretation would necessarily produce is as follows:

> "A" is lawfully sentenced to serve two years for a felony violation (it happens to be his second). "B" is lawfully sentenced to serve thirty years for a felony violation (it happens to be his second).

As to "A", the State of Florida has but two years within which to proceed against him as a second felony violator. Yet as to "B", the State of Florida has thirty years within which to do the same. Such a sliding scale of limitations might well be condemned as a denial of equal protection. Nevertheless, petitioner's position is the very seed from which such an anomalous result might grow.

In fine, you respondent respectfully suggests that the case of *George v. Louisiana*, 340 U.S. 949, is the only polar star to which this Court need turn for an answer to the situation. While it may well be true that this Court's disposition of those proceedings (denial of the petition for certiorari without opinion), may make no conclusion

as to the merits thereunder, one can only conclude that if it was fraught with denials of due process as are urged in the instant proceedings, it is difficult to imagine that such a blatant disregard for the human rights involved would have produced no greater reaction in this Court than that necessary to enter a simple order of denial not even meriting an opinion.

The allegedly salient differences which petitioner points to between the *George* case, supra, and the instant proceedings are of no consequence. The main and only thrust in the *George* case, supra, was the complaint that the imposition of a habitual offender sentence after the last felony conviction had been served constituted the basis for the claim that due process was denied.

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The alleged failure to caution petitioner as to his rights must, in order to justify redress by this Court, have worked such an untoward hardship on him as resulted in a conviction where otherwise one could not have been obtained under any circumstances.

Just what is contemplated by the provisions in Section 775.11, supra, requiring the court to advise one charged thereunder as to his rights is somewhat difficult to ascertain for it has never been quite set down. Might it not be suggested logically that it of course contemplates that the man would be advised (1) that he could have a jury trial (2) that he is not required to incriminate himself (3) that he had the right to counsel, and (4) that he be advised of the nature of the charges against him?

Continuing the assumption that the above-mentioned four rights as such, are embraced within the due process clause of the Federal Constitution, we progress to a determination of whether or not these matters were known graphically to the petitioner even if he had not received an affirmative notice thereof from the court in question.

1. By what logical thought processes could it be said that petitioner was not aware that he was allowed to have a jury trial? Here was a man who had committed a felony in 1934—had been punished therefor and a number of years later committed yet another felony and been punished therefor. During the course of those two proceedings one could almost necessarily conclude that he would have to be acquainted with the procedures involved, particularly with relation to the fact that he was entitled to be tried by a jury as an alternative to pleading guilty if he so chose.

2. Just as surely, because of the aforesaid, could one not also conclude that he was thoroughly acquainted with and possessed of the certain knowledge that he need not incriminate himself with testimony from his own lips?

3. The particular element relating to the right to counsel is certainly the least subject to criticism. This is patently so for in truth and fact if the petitioner's allegations be taken as true (which this response by no means does), then obviously he was aware that he had a right to counsel for, as he contends, he had secured the services of counsel and, if we indulge him further, said counsel was physically on his way to the court at the

time the proceedings herein challenged were being conducted. To this end, his own pleadings reduce his claims to the level of a nullity.

4. The fourth and final segment within the rights perhaps contemplated by Section 775.11, supra, broaches an area which the petitioner's own pleadings and exhibits clearly show to be non-existent, that is to say that at the time he was taken before the trial court he was certainly advised of the charges pending against him when the information was read to him.

Thus, it is that petitioner's claim that the court did not caution him as to his rights becomes nothing more than a conclusion founded on conjecture and based on surmise.

So much of the petitioner's argument as directs itself to an alleged claim that due process was denied him by the trial court's alleged refusal to grant him an extension of time within which to allow his counsel to appear in order that he represent him is, not only vigorously denied in every respect, but even if admitted, presents no bar to a conclusion that the proceedings were valid in every cognizable degree.

Your respondent respectfully contends that the allegations contained in the petitioner's petition do not show or allege that the trial court deprived petitioner of due process when it allegedly refused to await the arrival of defendant's counsel and proceeded in his absence without appointing substitute counsel.

For all that was shown by the petitioner to the Supreme Court of Florida, petitioner's attorney was absent from court without any excuse or justification at a time when he should have been present. Certainly it was not the court's responsibility to see that he was present but, quite the contrary, it was the petitioner's and his only. Thrust upon him was the burden of seeing that his attorney was present in court at the appropriate time and by the very contents of his own petition, it clearly appears that he did not meet that burden. Nor can it be said from the confines of this petition that he had shown in any respect that he had presented the trial court any justification or excuse for the absence of his attorney at the time in question. It is not believed that the trial court is required to delay the disposition of a case merely because defense counsel is absent when he should be present. It follows that if and when defense counsel is absent at a time when he should be present, and there is no justification or excuse advanced for his absence, a trial court does not deny due process of law if it proceeds without either awaiting the arrival of said counsel or appointing substitute counsel unless it appears the defendant is incompetent to represent himself in the particular case which is pending against him.

The statements attributed to the trial court by the instant petitioner clearly show that the court was of the opinion (obviously justified from the trial judges affidavit) that the petitioner was quite competent to represent himself in the proceedings. Whether that opinion was based on a personal acquaintance with and observation of the petitioner is not revealed by said petition.

However, it may fairly be said that whatever its basis may have been, the soundness of the trial court's opinion in that particular was not and is not challenged by said petition, which itself made no showing, claim or allegation that the petitioner was incompetent to represent himself by reason of youth, inexperience, ignorance, mental incapacity or any other suggested infirmity.

Further, the factual issue in the second offender prosecution against the petitioner was quite narrow and relatively simple. Under the applicable statute, Section 775.11, Florida Statutes, the only factual issue to be resolved in said prosecution was one of identity, that is to say whether the petitioner was the same person who had suffered the convictions alleged in the second offender information filed against him. There is no showing in the record and no allegation in the petition to the Supreme Court of Florida that the petitioner could not competently represent himself in a trial embracing that simple and uncluttered issue.

Nor did the petitioner contend in his petition to the Supreme Court of Florida that there was any meritorious legal point which a lawyer could have urged to the trial court in his defense. In this connection, it is respectfully observed that, by denying his petition, the said Supreme Court ruled against him on every legal question raised by his petition which could have been raised at the trial.

So it is that there was no showing before the Supreme Court of Florida or for that matter, an allegation, that the petitioner was not in any way competent to represent himself in the particular prosecution with which he was

confronted or that the trial court denied him due process of law when it proceeded without awaiting the arrival of alleged counsel who, for aught that appears, was absent without justification or excuse.

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It only remains, from what has been set out above, to determine whether with the logical inferences which can be drawn and the natural progression which follows such inferences, petitioner was in fact the recipient of undue hardship (which he equates with the denial of due process) to such an extent as to deprive him of fundamental rights assured by law.

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Let us assume arguendo that everything petitioner alleges relative to the issue of counsel is as he contends. Let us further assume that the exhibit lately tendered by petitioner (the one reflecting a letter from D. C. Laird, Attorney, Lakeland, Florida, to Mrs. Sadie M. Bradley) might lead one to believe that in fact some employment arrangement had either been made or discussed relative to the petitioner's plight. Does it not follow as the night the day that even if such arrangements had been made either prior to, during or subsequent to the proceedings in question, that counsel was not only fully capable but aware that with these particular circumstances he could have been assured that any motion to withdraw the plea of guilty entered by the petitioner

would have been granted as a matter of course by the trial judge in question?

That being so, and surely it must be, he had his counsel and could have achieved a satisfactory result by the simple advent of having his alleged counsel file a motion for leave to withdraw the plea of guilty setting out the particulars upon which he here relies.

It is respectfully submitted that such was an easy alternative, open either to the petitioner or to his counsel; if he ever had one, or to both of them. That he did not avail himself of his ready remedy is quite obvious.

Equally available to petitioner as an easy alternative to the allegedly harsh edict of the trial court (refusing to wait for his counsel), was the avenue of a plea of not guilty. This Court could take judicial knowledge of the state of trial court calendars. The entry of a plea of not guilty would have required petitioner's case to be set for trial at a time subsequent to said plea. That would have given said counsel time to arrive and function in such capacity as the circumstances indicated.

To the possible assertion that this is at best, hindsight, your respondent contends that if petitioner ever did say what he alleges he said to the trial court and if he ever did contract for legal representation with D. C. Laird, he did not do so simply to have counsel tell him to plead guilty. That much, he was infinitely better equipped to do (the charge being what it was) than any human being in existence. No one could know better than he, who he was. No one could know better than he, whether he had

suffered the two former felony convictions. That being the only avenue of inquiry, his personal knowledge thereof knew no equal. His legal need must therefore be considered in that light.

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It is only necessary that we examine a totality of relevant facts, *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, in order to decide whether the lack of counsel introduced into the trial "an ingredient of unfairness" which actively operated in the process that resulted in the confinement of petitioner. *Foster v. People of State of Ill.*, 332 U.S. 134, 67 S.Ct. 1716, 1718, 91 L.Ed. 1955. As stated in *Quicksall v. People of State of Michigan*, 339 U.S. 660, 70 S.Ct. 910, 913, 94 L.Ed. 1188, it is only when denial of counsel suggests a "disregard of fundamental fairness" that a state of criminal proceeding will be invalidated by reason of the due process clause. The sum of all the precedents simply is that lack of counsel in state non-capital trials will be held fatal to a conviction, in a post conviction proceeding "only when the absence results in a denial to accused of the essentials of justice." *Gallegos v. State of Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 147, 96 L.Ed. 86; also see, 93 L.Ed. 137; 94 L.Ed. 1193; and 96 L.Ed. 161.

Having drawn his pleadings (without exception, sans the benefit of counsel), with a degree of skill which rewarded him with one victory and (depending upon the outcome of this proceeding) possibly two, out of the three

which he filed, it would literally require the application of a judicial sorcerer's stone to his status at the time in question to produce in the minds of reasonable men a conclusion that, even in light of the law of due process as set out by this Court, this man was dealt with unfairly.

## CONCLUSION

Wherefore it appears almost conclusively that no rights, assured petitioner by either Federal or Florida law, were denied him. The proceedings about which petitioner complains did no violence to his liberty which has not been recognized as valid and lawful in every pertinent way. It follows that the certiorari should therefore be denied.

Respectfully submitted,

H. G. COCHRAN, JR., Director,
Division of Corrections, State of Florida
Respondent

RICHARD W. ERVIN
Attorney General

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Counsel for the Respondent

## PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Respondent to Honorable Claude Pepper, Counsel for Petitioner, 1701 Meridian Avenue, Miami Beach, Florida, by mail, this_____day of February, 1961.

GEORGE R. GEORGIEFF
Assistant Attorney General
Of Counsel for the Respondent